

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 14, 2006

STATE OF TENNESSEE v. GINGER J. JACKSON

Appeal from the Circuit Court for Franklin County
No. 14462 Thomas W. Graham, Judge

No. M2005-01651-CCA-R3-CD - Filed May 30, 2006

The Appellant, Ginger J. Jackson, was convicted by a Franklin County jury of soliciting the first degree murder of her ex-husband and was sentenced to a term of eight years and six months confinement in the Department of Correction. On direct appeal, a panel of this court affirmed Jackson's conviction but modified her sentence to eight years based upon violations of *Blakely v. Washington*. Additionally, the case was remanded to the trial court "for the consideration of [her] suitability for probation." *State v. Ginger Jackson*, No. M2003-02539-CCA-R3-CD (Tenn. Crim. App. at Nashville, Mar. 4, 2005). On remand, the trial court again imposed a sentence of eight years and six months, relying upon our supreme court's decision in *State v. Gomez*, which was decided after this court's opinion was filed on March 4, 2005, and after the mandate had issued in this case. On appeal, Jackson argues that the trial court erred in failing to proceed with the mandate of this court, *i.e.*, entry of a sentence of eight years and consideration for probation. Because we conclude that the law of the case doctrine is inapplicable to the facts of this case, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Paul D. Cross, Monteagle, Tennessee, for the Appellant, Ginger J. Jackson.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; and Steve Blount, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

In March 2002, the Appellant was indicted for solicitation to commit the first degree murder of her ex-husband. *Jackson*, No. M2003-02539-CCA-R3-CD. The two had a bitter divorce, and,

following an adverse ruling in her petition for custody of her son, the Appellant offered an acquaintance money to kill her ex-husband. *Id.* Following a jury trial, the Appellant was convicted as charged and subsequently sentenced to a term of eight years and six months in the Department of Correction. *Id.* The sentence was based upon the application of two enhancement factors. The Appellant filed a direct appeal to the Court of Criminal Appeals, and a panel of this court issued its opinion on March 4, 2005, affirming the conviction. However, despite noting that the eight-year and six-month sentence was warranted under the terms of the 1989 Sentencing Act, the court, in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), reduced the Appellant's sentence to eight years, the minimum sentence for a Range I, Standard Offender convicted of a Class B felony. *Id.* In addition, the court remanded the case to the trial court for consideration of whether the Appellant was suitable for probation. *Id.* No appeal was filed by either the State or the Appellant, and the mandate of the Court of Criminal Appeals was filed on May 18, 2005.

However, on April 15, 2005, the Tennessee Supreme Court issued its opinion in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), holding that Tennessee's sentencing structure was not affected by the *Blakely* decision. During the trial court's subsequent June 14, 2005 sentencing hearing, the trial court concluded that the holding in *Gomez* overrode the Court of Criminal Appeals' mandate. In view of this conclusion, the trial court reinstated the Appellant's sentence of eight years and six months and declined to consider her eligibility for probation. This appeal followed.

Analysis

On appeal, the Appellant asserts that the trial court erred by not following the Court of Criminal Appeals' mandate. She asserts that, because the State failed to appeal the Court of Criminal Appeals' decision when the mandate issued, it became the law of the case and, therefore, was not subject to the Tennessee Supreme Court's decision in *Gomez*. The State asserts that the trial court was not bound by the decision of the Court of Criminal Appeals under the law of the case doctrine because the prior decision was contrary to a change in the controlling law between the first and second appeal. We agree.

"The appellate court directs actions and dictates results through its orders, judgments, and mandates." *State v. Williams*, 52 S.W.3d 109, 123 (Tenn. Crim. App. 2001); *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995). Such orders and mandates are controlling, and the lower court does not have "the authority to expand the directive or purpose of [the higher] Court imposed upon remand." *State v. Weston*, 60 S.W.3d 57, 59 (Tenn. 2001). Otherwise, "[t]here would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions." *Irick*, 906 S.W.2d at 443 (quoting *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976)).

"Under the doctrine of the law of the case, when an initial appeal results in a remand back to the trial court, the decision of the appellate court establishes the law of the case, which must be followed on remand." *State v. Carter*, 114 S.W.3d 895, 902 (Tenn. 2003) (citing *State v. Jefferson*, 31 S.W.3d 558, 560-61 (Tenn. 2000)). However, there are three recognized exceptions to this rule.

An issue in a prior appeal may be reconsidered if: “(1) the evidence offered at the hearing on remand was substantially different from the evidence at the first proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in the controlling law occurring between the first and second appeal.” *Id.*

As noted, the Tennessee Supreme Court issued its decision in *Gomez* on April 15, 2005, and held that the Tennessee Sentencing Reform Act did not violate the Sixth Amendment guarantee of a jury trial and was, thus, not affected by the *Blakely* decision. *Gomez*, 163 S.W.3d at 661. Clearly, the holding in *Gomez* is in conflict with the panel of this court’s opinion, which modified the Appellant’s sentence solely due to *Blakely* violations. Thus, the opinion of the Court of Criminal Appeals, filed on March 4, 2005, is contrary to a change in the controlling law which occurred between the first and second appeals. Accordingly, the law of the case doctrine did not bar the trial court’s consideration of the *Gomez* holding at the second sentencing hearing, nor did it prohibit its application to the terms of the remand. *See State v. Abel Torres*, No. M2004-00559-CCA-R3-CD (Tenn. Crim. App. at Nashville, Feb. 4, 2005). We conclude that the trial court did not err in reinstating the Appellant’s eight-year and six-month sentence, as the Court of Criminal Appeals found it appropriate except for *Blakely*. Because the Appellant’s sentence is greater than eight years, she is ineligible for probation consideration. *See* T.C.A. § 40-35-303(a) (2003). As such, the trial court was not required to consider the Appellant’s suitability for probation.

CONCLUSION

Based upon the foregoing, the judgment of the Franklin County Circuit Court is affirmed.

DAVID G. HAYES, JUDGE